

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16-CRB-0001 SR/PSSR
(2018-2022) (Remand)

**SOUNDEXCHANGE, INC.’S RESPONSE TO MUSIC CHOICE’S OPPOSITION TO
ISSUANCE OF A SUBPOENA**

Music Choice’s Opposition to SoundExchange’s Motion for Issuance of a Subpoena to Prager Metis is both improper and counter to the truth-finding function of this proceeding. SoundExchange briefly responds to some of the most glaring problems with Music Choice’s position:

As an initial matter, it is not obvious that Music Choice has the authority to oppose the issuance of a subpoena directed at another party. Music Choice cites no authority from the CRB or elsewhere that allows for this type of intervention.¹

Moreover, the standards Music Choice propounds have no basis in the law and find no support in its brief. First, there is no requirement that a subpoena may be issued only to “unwilling” parties. *See* Opp. at 1. Were this the case, third-party subpoenas would uniformly result in objections and motions to quash; this is certainly not the case in the Copyright Royalty Board or

¹ Music Choice has not, for instance, suggested that Prager Metis’s compliance with the proposed subpoena would require disclosure of Music Choice’s “trade secrets, or other confidential research, development, or commercial information,” such that an order to quash might be permissible analogy to the federal rules. FRCP (d)(3)(B)(1). Indeed, the very issue that prompted the instant dispute over defensive audits was Music Choice’s refusal to provide information to Prager Metis.

elsewhere.² Second, Music Choice is wrong that the proposed order would give Prager Metis “an excuse to violate a nondisclosure agreement.” By the terms of the NDA (to which Music Choice is not a party), issuance of a subpoena or court order would ensure that the safeguards of that agreement were properly attended. *See* Ex. B to Motion (NDA). Prager Metis is acting in strict compliance with the NDA, and SoundExchange filed its request for a subpoena in pursuit of that goal. *See* Mot. at 1.

Third, Music Choice’s suggestion that third-party discovery is permissible only if it will benefit both parties equally is unfounded. *See* Opp. at 3-4, 6 (disparaging SoundExchange’s proposed requests as “one-sided,” “partisan” and “cherry picked,” and asserting “the issued subpoena must be modified to provide a full and accurate record with respect to Prager Metis’s evaluation of the BDO audits”).³ Although accurate testimony is always required, there is no obligation for a participant in an adversarial proceeding such as this one, to make the other side’s arguments for them. It should come as no surprise that Music Choice can identify no authority for the proposition that it should be permitted to rewrite SoundExchange’s proposed topics to better serve its own goals.

Were Music Choice serious about providing the Judges with a full record – as opposed to frustrating SoundExchange’s efforts to do so – it could have sought (or provided) additional discovery itself.⁴ Instead, Music Choice has taken every opportunity to prevent the Judges from obtaining relevant information about its defensive audits. *See* Mot. at 5-6; Music Choice’s Motion

² Although it is true that Prager Metis expressed a willingness to comply, it has not agreed to do so at the expense of its obligations under the non-disclosure agreement.

³ The suggestion that any declaration from Mr. Stark will be less than truthful or not reflective of his personal knowledge is beyond the pale. Opp. at 4 (baselessly asserting that Mr. Stark will submit an “attorney-drafted declaration”)

⁴ Music Choice, like SoundExchange, could have sought third-party discovery, but chose not to do so.

to Compel, Dkt. No. 23887 (seeking privileged documents from SoundExchange); Ex. D to Mot. at 5 (refusing to produce additional audit documents). .

In light of the upcoming deadlines in this case, including a June 30, 2021 deadline for filing substantive briefs, SoundExchange's request that the Judges issue a subpoena to Prager Metis should be granted promptly, and Music Choice's attempt to modify this request should be denied.

Dated: May 14, 2021

Respectfully submitted,

/s/ Emily L. Chapuis

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Proof of Delivery

I hereby certify that on Friday, May 14, 2021, I provided a true and correct copy of the SoundExchange, Inc.'s Response to Music Choice's Opposition to Issuance of a Subpoena to the following:

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Recording Industry Association of America, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

American Federation of Musicians of the United States and Canada, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

American Association of Independent Music ("A2IM"), represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Music Choice, represented by Paul M Fakler, served via ESERVICE at pfakler@orrick.com

Warner Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

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Signed: /s/ Emily Chapuis